

STATE OF VERMONT
HUMAN SERVICES BOARD

In re) Fair Hearing No. 21,194
)
Appeal of)

INTRODUCTION

The petitioner appeals a decision by the Department for Children and Families, Family Services Division, to substantiate physical abuse of a child. The issue is whether the Department has shown by a preponderance of the evidence that the petitioner physically abused a child within the meaning of the pertinent statutes.

FINDINGS OF FACT

1. The petitioner is married and the father of three boys, ages seventeen, sixteen, and thirteen. Petitioner and his wife adopted their children. Petitioner adopted D.C.A., his second son and the subject of this case, when D.C.A. was one year old.

2. The incident in question occurred on June 12, 2007 when D.C.A. was fifteen years old. As will be more fully described below, the petitioner and D.C.A. became involved in an argument about homework that escalated into a physical confrontation.

3. D.C.A. receives special education services through an Individualized Education Plan (IEP). At the time of the incident, D.C.A.'s eligibility was based on a diagnosis of Attention Deficit Disorder.¹ D.C.A. was assigned a one-to-one aid to help him understand his assignments, organize his school work and stay on task. D.C.A. met regularly with a school clinician to work on social interactions. He also received speech/language services. The petitioner was and has been the primary parent working with the school district regarding D.C.A.'s educational needs.

4. The petitioner and his sons are involved in numerous athletic activities; petitioner's involvement includes coaching on some of their teams. D.C.A. rows and plays baseball. D.C.A. has been part of a rowing team for three years. Both D.C.A. and the petitioner work out regularly.

5. The incident came to the attention of the Department through a report from D.C.A.'s school on June 14, 2007.

6. R.B. was D.C.A.'s one-on-one aid and worked with D.C.A. on a daily basis. She helped D.C.A. understand his

¹D.C.A. is undergoing a reevaluation for special education eligibility. Part of the evaluation process is to rule out Asperger's Syndrome.

assignments. She described D.C.A. as quiet and easygoing with a stubborn streak. On June 13, 2007, R.B. noticed scratches on D.C.A.'s neck and asked him if he had been scratched by bushes. R.B. explained that she knew D.C.A. liked to go in the woods. D.C.A. told her no.

On June 14, 2007, D.C.A. complained that his neck hurt. R.B. asked him how he hurt his neck and he just smiled. R.B. jokingly asked D.C.A. whether he had a fight with his dad. R.B. testified that D.C.A. said yes and told her that he blacked out after his dad attacked and choked him.

R.B. understood that the school needed to report the incident and went to T.F., a school counselor.

7. T.F. is employed through the Counseling Service of Addison County as a school based clinician; he has a caseload of approximately fifteen students. During the 2006-2007 school year, T.F. met with D.C.A. regularly to work on social skills.² Normally, T.F. met with D.C.A. weekly but there were occasions when he saw D.C.A. more frequently. T.F. described the petitioner as a cooperative and supportive parent.

² T.F. is continuing to work with D.C.A. this school year. Petitioner testified that he encouraged his son to continue working with T.F. this school year.

8. T.F. testified that R.B. came to see him on June 14, 2007 because she was concerned by the information D.C.A. told her. T.F. met with D.C.A. and then consulted with his supervisor.

T.F. explained that D.C.A. told him that there was a disagreement with his father about the best way to study and that they both became angry. They started shoving each other, and that he ended up on the floor where his dad choked him. He told T.F. that he blacked out.

T.F. then contacted the Department to report suspected abuse that same day. T.F. described D.C.A.'s demeanor that day as hesitant and more withdrawn than usual and that he appeared angry at times when describing the incident. T.F. stated that D.C.A. seemed confused about why they were talking about the June 12 incident.

9. T.F. was present on June 15, 2007 when D.C.A. was interviewed by S.M., an investigative social worker with the Department. T.F. was also present when S.M. interviewed the petitioner and his wife on June 18, 2007.

10. S.M. has been employed for 2.5 years with the Department as a social worker. She was assigned this case on June 14, 2007 and went to D.C.A.'s school on June 15, 2007. S.M. first interviewed T.F. and was told that D.C.A. did not

want to be interrogated. She learned that the petitioner was the primary parent working with the school and that the petitioner was a good parent in this regard.

11. S.M. arranged for T.F. to sit in the interview as it is her practice to have a third party present at interviews. T.F. testified that during the interview D.C.A. seemed withdrawn with his head down and not making eye contact. T.F. testified that it is sometimes difficult to gauge D.C.A.'s feelings because of the way he presents himself.

12. S.M. testified that she does not remember if the marks were visible from where she was seated. D.C.A. moved his collar which made the marks visible. She stated that she left the room while T.F. took pictures of the marks.

13. S.M. testified that D.C.A. was quiet and shy during the interview and that she took time to make him comfortable. According to S.M., D.C.A. explained the incident as follows. He asked his father for help with his studies and he did not like his father's recommendations. D.C.A. became frustrated and wanted to leave but his dad pushed him back. D.C.A. said he pushed his father including pushing him against a large window. The window is about ten feet above the ground. Then, his father grabbed him by the collar and threw him to

the ground where his father held him down first with two hands around his neck and then with one hand on his neck and collarbone and the other hand on his arm. D.C.A. said he blacked out when he was on the floor. His dad left the room and came back with his mother. His mother told him to get up from the floor which he did. He said his mother also said he was faking it. S.M. testified that D.C.A. demonstrated what happened on the floor without being asked.

14. S.M. said that D.C.A. was not afraid about going home. S.M. spoke to T.F. and to the petitioner that day. S.M. believed it was safe to send D.C.A. home.

15. S.M. interviewed petitioner and his wife on June 18, 2007. T.F. was present for the interview. According to S.M., the petitioner described the incident as follows. D.C.A. became frustrated while he was trying to help D.C.A. with homework. He stated there was pushing and that D.C.A. pushed him against the window. He said he restrained D.C.A. and put D.C.A. on the floor where he held him by the shoulder, not by his neck. Petitioner said the reason he restrained his son was for his son's personal safety. Petitioner said that D.C.A. was acting unconscious so he raised and dropped his son's arm as a test and his son moved his arm when it was released.

16. S.M. learned of one other incident from both the petitioner and D.C.A. in which an argument escalated to pushing the previous winter. There were no injuries.

17. S.M. testified that she looked at safety factors as part of her report. S.M. stated that petitioner was cooperative. He was not violent nor a serious risk of harm to his children. Petitioner was not trying to flee. He was not unduly negative to his son or applying unreasonable expectations. There was no history of petitioner maltreating D.C.A. S.M. was not concerned about D.C.A.'s safety with the petitioner.

18. S.M. finished her interviews on June 18, 2007. Based on her investigation, S.M. submitted a letter to her supervisor on August 17, 2007 recommending substantiation of abuse. The supervisor approved the substantiation.

19. Four photographs were admitted into evidence; they were taken three days after the incident. The photographs show that D.C.A. had acne.

Two photographs of the neck show two scratch marks parallel to each other slanting up left to right near the collar on the left side of D.C.A.'s neck. There is a third scratch mark to the right of these two scratch marks slanting downwards to the bottom left scratch. On the right side of

the neck, there is a mark that appears to be a scratch mark. There is no other bruising.

The two other photographs of the upper chest area show a mark on the right side of D.C.A.'s chest approximately halfway between the midline and shoulder. This mark is a red oval. There is no other bruising.

D.C.A. was not seen by a doctor following the incident. The injuries were not reviewed by medical staff to see if they were consistent with the account of choking.

20. The petitioner testified that his entire family was home the evening of June 12, 2007. His wife was watching television in their bedroom; the other two children were elsewhere in the house. Petitioner was at a computer in the den or family room. D.C.A. was preparing for a test the next day. Petitioner stated that his son received the study materials two weeks before the final exam but waited to the last moment to study.

D.C.A. asked petitioner for help. Petitioner explained that they did not have sufficient time to follow through on the teacher's instructions so he suggested a different method. Petitioner and his son disagreed. D.C.A. wanted to quit but petitioner told him to continue.

Their disagreement escalated. D.C.A. hit petitioner on the chin. They were pushing, and then D.C.A. pushed petitioner against the window. There is a large three pane window on the west wall of the room. D.C.A. was in the south of the room near the western wall.

Petitioner stated he went around D.C.A., grabbed him, positioned him on petitioner's hip and put his son on the ground facing up. Petitioner testified that he was on top and holding his son's chest. Petitioner stated that D.C.A. was flailing.

Petitioner thought he had the situation under control once D.C.A. stopped flailing. D.C.A.'s eyes started to flutter. Petitioner thought his son was faking being unconscious. Petitioner picked up D.C.A.'s arm and let it drop as a test whether D.C.A. was faking unconsciousness. D.C.A. pulled away.

21. Petitioner left the room to get his wife. He told her what happened and asked her to speak to D.C.A. Petitioner returned to the room with his wife after a minute. His wife told D.C.A. to get up from the floor. D.C.A. immediately got up from the floor. He returned to his studies.

22. Petitioner testified that he did not see any marks on D.C.A. until that Thursday after school.

23. Petitioner testified that he restrained his son for both of their safety. Petitioner was concerned that he or his son could be pushed through the glass window. He stated it was not his intention to harm his son.

24. He described his son as strong from working out and rowing. They are approximately the same height although petitioner is heavier. T.F. confirmed in his testimony that D.C.A. has been working out since last winter and has good upper body strength.

25. C.A. is the petitioner's wife and D.C.A.'s mother. She was home the evening of June 12, 2007 in her bedroom. She testified that the incident occurred around 7:30 p.m. The petitioner came to their bedroom. She described the petitioner as upset and pale. She testified that petitioner told her he had been punched and pushed by D.C.A. He told her that he restrained their son. Petitioner asked her to speak to D.C.A. She went to the family room and saw D.C.A. on the floor with his eyes shut but fluttering. C.A. told him to get up which he did immediately. C.A. said D.C.A. went back to his studies.

26. The petitioner and C.A. were interviewed together by S.M. on June 18, 2007. Both testified that the petitioner told S.M. and T.F. that petitioner had been punched by D.C.A. S.M. has no recollection of being told about the punch. T.F. testified that the punch may have been mentioned.

27. D.C.A. testified at the hearing. D.C.A. did not want to be at the hearing; he was worried about his family and what would happen to his father. According to T.F., D.C.A. told him on several occasions since September 2007 that he was concerned about this case. There was no evidence that D.C.A. had been pressured by family regarding his testimony.

28. D.C.A.'s testimony at hearing differed, in part, from his earlier reports to school personnel and to S.M. He confirmed that he asked his father for help and did not like the advice he received. D.C.A. stated he lost his temper when his dad insisted that he continue to study.

D.C.A. confirmed that he pushed his dad and that he pushed his dad into the window. He stated that he was hitting his dad.

D.C.A. testified that he tripped over a plant and was on the floor for about three minutes. While he was on the floor, his dad held him down with one hand holding down the

lower part of his neck and one handing holding his arm. He stated that he did not pass out but stopped struggling because he was mad.

D.C.A. confirmed that his dad left the room and came back with his mother. He confirmed that his mother told him to get up and he did so.

29. D.C.A. was shown the photographs. He said the two pictures of his neck show his acne breakout. He testified that the other pictures of his chest show a bruise from his fall.

30. D.C.A. was questioned whether he was truthful in his reports to R.B., T.F., and S.M. He testified that he was only partly truthful because he was still angry with his dad when he spoke to them. In terms of T.F., D.C.A. contradicted himself at hearing by saying he did not tell T.F. the whole truth and, also, saying he did.

ORDER

The Department's decision to substantiate abuse is reversed.

REASONS

The Department for Children and Families is required by statute to investigate reports of child abuse and to maintain

a registry of all investigations unless the reported facts are unsubstantiated. 33 V.S.A. §§ 4914, 4915, and 4916.

The statute has been amended to provide an administrative review process to individuals challenging their placement in the registry. 33 V.S.A. § 4916a. If the administrative review results in a decision upholding the substantiation, the individual can request a fair hearing pursuant to 3 V.S.A. § 3091. Upon a timely request for fair hearing, the Department will note in the registry that an appeal is pending. 33 V.S.A. § 4961b(a).

The pertinent sections of 33 V.S.A. § 4912 define abuse, harm, and physical injury as follows:

(2) An "abused or neglected child" means a child whose physical health, psychological growth and development or welfare is harmed or is at substantial risk of harm by the acts or omissions of his or her parent or other person responsible for the child's welfare. . . .

(3) "Harm" can occur by:

(A) Physical injury or emotional maltreatment;

. . . .

(6) "Physical injury" means death, or permanent or temporary disfigurement or impairment of any bodily organ or function by other than accidental means.

Evidentiary Issues

D.C.A.'s statements from June 2007 form the backbone of the Department's decision to substantiate abuse. At hearing,

D.C.A. appeared as the Department's witness but gave markedly different testimony regarding key points of the Department's case. The Department offered testimony of D.C.A.'s earlier statements through the testimony of R.B., T.F., and S.M. who recounted what they had been told by D.C.A. Objections were duly raised at the hearing by petitioner.

A. Impeachment

A party may impeach the credibility of a witness they have called. 12 V.S.A. § 1642, Vermont Rules of Evidence (VRE) 607. Further, VRE 613(b) states:

Extrinsic evidence of a prior or a prior inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate him thereon...

D.C.A. was given an opportunity to explain the inconsistencies. Both parties had an opportunity to examine him. During his testimony, he explained how he lost his temper at the petitioner and how he was not totally truthful in recounting what happened to school personnel or to the Department social worker because he was still mad at the petitioner.

The prior inconsistent statements testified to by R.B., T.F., and S.M. can be used to impeach D.C.A.'s testimony

consistent with Vermont law. The Vermont Supreme Court stated in State v. Dragon, 128 Vt. 568 (1970) on page 570:

Such statements are impeaching statements only, and when the witness is not a party, are not evidence to prove the fact to be as stated. Bennett v. Robertson, 107 Vt. 202, 212, 177 Atl. 625.

B. Hearsay

The Department asks that D.C.A.'s initial statements be admitted as substantive evidence.

The Board usually operates under a relaxed hearsay rule based upon Fair Hearing Rule 12 which states:

The rules of evidence applied in civil cases by the courts of the State of Vermont shall be followed, except that the hearing officer may allow evidence not admissible thereunder where, in his or judgment, application of the exclusionary rule would result in unnecessary hardship and the evidence offered is of a kind commonly relied upon by reasonably prudent persons in the conduct of their affairs.

In the past, the relaxed hearsay rule was applied to appeals of child abuse substantiation including child sexual abuse. See In Re: Tonya Selivonik, 164 Vt. 383

(1995) (affirming Board decision in which the Board relying on hearsay evidence denied the petitioner's request for expungement).

However, the application of the relaxed hearsay rule in child abuse cases was chipped away by the ruling of In Re

C.M., 168 Vt. 389 (1998) (application of VRE 804a to administrative proceedings).

In Fair Hearing 16,391, the Board faced the conundrum that the relaxed hearsay rule would apply to an alleged sexual abuse victim older than ten years while the stricter hearsay rule applied to younger and, arguably, more vulnerable sexual abuse victims. In order to consistently treat child sexual abuse victims, the Board extended the use of VRE 804a criteria to all cases involving child sexual abuse victims.

The Board has recently applied these same criteria in a case involving the use of investigative records in a physical abuse case in which the children were not available to testify. Fair Hearing 20,690.

Under the Board analysis of VRE 804a, the four following criteria must be met before hearsay statements are allowed as evidence; (1) the child is the putative victim, (2) the child is available to testify, (3) the statements were not taken to prepare for a legal proceeding, and (4) the time, content, and circumstances of the statements provide substantial indicia of their trustworthiness.

In this case, D.C.A. is the alleged victim. D.C.A. was available to testify and did testify at the fair hearing.

The statements were not taken in preparation of a legal proceeding. It should be noted that the Department did not offer into evidence any written notes or investigatory records. The testimony regarding D.C.A.'s statements was based upon the recall of witnesses.

The key criterion is trustworthiness. Elements of trustworthiness include disclosure to trusted and reliable adults in an unpressured setting, consistency when the alleged victim describes what occurred, sufficient details, and corroboration by medical or other evidence. In Re M.B., 158 Vt. 63 (1992), State v. Labounty, 168 Vt. 129 (1998).

T.F.'s testimony indicated that D.C.A. was confused why they were discussing the incident both when T.F. spoke to him on June 14, 2007 and when he was interviewed on June 15, 2007. T.F. noted that D.C.A.'s demeanor was hesitant and withdrawn and that it can be hard to gauge D.C.A.'s feelings from his demeanor. This is not a case where an alleged victim sought out a trusted adult to confide in.

D.C.A. was not seen by a doctor after the incident; there is no medical corroboration regarding what caused the scratches on D.C.A.'s neck and the mark on his chest or whether the statements regarding choking are consistent with the marks.

The question is whether there are substantial indicia of trustworthiness. Substantial means considerable whether in degree or extent. The indicia do not rise to that level. The hearsay statements will not be admitted to prove the underlying allegations.³

Definition of Harm

Petitioner raises the question of whether his actions on June 12, 2007 rise to the level of "harm" contemplated by 33 V.S.A. § 4912(3). An argument about homework got out of hand and escalated into a physical confrontation. Petitioner argues that he meant no harm to his son, that he took steps to restrain his son to prevent injury to both his son and himself, and that any subsequent injury was an accident.

Fair Hearing 10,687 looked closely at the definition of harm noting that the definition of "harm" encompasses a wide range of events but does not require a finding of abuse in each and every case. The Board looked at the definition of harm in conjunction with the definition of an "abused or neglected child" found at 33 V.S.A. § 4912(2) emphasizing that the situation, as a whole, needed to be looked at.

Although the child had a bruise from spanking, the parents

³ Inasmuch as this same evidence was admitted for impeachment purposes, and was fully considered by the hearing officer, the hearsay ruling is of no consequence to the outcome of this matter.

were caring parents who normally did not use spanking for discipline, would not do so in the future, and the child was not believed at risk of harm. The Board contrasted this case with Fair Hearing 10,419 in which evidence of a bruise in conjunction a history of hitting demonstrated that the child was being harmed by the parents.

The Department released D.C.A. to his parents' custody because the Department felt there was no risk in doing so. S.M. testified about the risk factors the Department uses; her findings were that the petitioner was not violent and was not a risk to D.C.A.

Looking at the situation as a whole, this case should follow the holding in Fair hearing 10,687 with a finding that the Department has not met its burden that abuse should be substantiated.

Further, assuming *arguendo* that petitioner caused the scratches and bruise to D.C.A. by grabbing D.C.A.'s neck in his attempt to restrain D.C.A., petitioner argues that any resulting physical injuries were caused by accident. Under the statute, physical injury by accidental means is not considered "harm". 33 V.S.A. § 4912(6).

The Board looked at how abuse "by other than accidental means" should be addressed in Fair Hearing 17,588 by

stressing the need to assess each case on its merits. Rivard v. Roy, 124 Vt. 32 (1963), see also State v. Koch, 171 Vt. 515 (2000). The Board adopted the definition of "gross negligence in Rivard, supra. Fair Hearing 17,588, on page 19 states that gross negligence or reckless behavior is whether:

. . . the act (a) demonstrated a failure to exercise a minimal degree of care or showed an indifference to a duty owed to another and (b) was not merely an error of judgment, momentary inattention or loss of presence of mind.

See also Mullin v. Flood Brook Union School District, 173 Vt. 202 (2001) (gross negligence is a heedless violation of legal duty).

In the heat of the moment, petitioner feared injury to his son and himself after being pushed into a large window. He decided to restrain his son to deescalate the situation. In doing so, petitioner brought his son to the floor and held him down. At hearing using 20/20 hindsight, the petitioner stated he would now do things differently. Petitioner's actions on June 12, 2007 comprised an error of judgment. His actions do not rise to the level of gross negligence or reckless behavior contemplated in Fair Hearing 17,588.⁴

⁴ The petitioner also raised self-defense, but there is no need to reach this argument in light of the above analysis.

The Department's finding of abuse should be reversed and the petitioner's name should be removed from the Child Abuse Registry.

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